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SPECIAL MASTER

SUPERIOR COURT FOR THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

In Re Grand Jury Subpoenas	)	
Referee Number GJ 01-02/04	)	Ruling By The Special Master Re
And GJ 04-05-03	)	Objections Raised to Subpoenas
	)	
	)	Rulings After In Camera Inspection
	)	of Documents Attached as Appendix
	)	A and Ordered to Remain Sealed
	)	

The undersigned has been appointed Referee by the order of the Court following the stipulation of the parties. Pursuant to that stipulation the parties adopted the procedure from the Code of Civil Procedure Section 638(a) and its case law as controlling in this criminal proceeding.

The Referee has had referred to him the issue of what documents shall be required to be produced pursuant to the Grand Jury Subpoenas that were issued before the date of the stipulation, or that shall be issued on or after the date of the stipulation pursuant to the Grand Jury's current investigation to the Custodian of Records, Roman Catholic Archdiocese of Los Angeles, a corporation sole, also known as the Archdiocese of Los Angeles, in face of objections asserted or to be asserted by

specifically-named priests. The Referee is to hear and determine any and all of the issues in this subpoena proceedings, whether of fact or of law.

It was further stipulated with respect to any such Grand Jury Subpoena issued after January 9, 2003, that the issue of what documents shall be required to be produced in response to such Subpoena automatically shall be incorporated within the scope of this reference, provided that the individual priest or his attorney executes a consent to the previously-filed Stipulation and Order for Reference and files such Consent with the Court, such that no further consent by the Court, by the People of the State of California, by the Roman Catholic Archbishop of Los Angeles, or by the individually-named priest shall be needed or required to empower the referee to hear, determine and report on the issue as it relates to the priest in question.

The stipulation stated that the referee would prepare a statement or (statements) of decision for each claim of privilege raised by any party, the referee's ruling thereon, and the factual and legal basis thereof. It was contemplated that more than one statement of decision would be required to resolve all of the matters included with the scope of the reference.

The parties further stipulated that should the referee's determination be adverse to any of the objecting parties production of any documents to be produced pursuant to said determination shall be stayed 30 days to permit the affected parties to file an appropriate pleading seeking review by the Court of Appeal.

It was also stipulated that this proceeding was subject to the pending Order Sealing Records, and no separate motion pursuant to Rule of Court 244.1(g) is required.

### **Procedural History**

A review of the procedural history of this matter is appropriate.

On June 12, 2002 the Grand Jury issued three subpoenas commanding the custodian of records for the Archdiocese to produce all documents “that relate in any way to the allegations of child molestations or sexual abuse” committed by three named priests. In response, counsel for the three priests, Donald H. Steier, filed a Motion to Quash Subpoenas Duces Tecum, in August 2002. The motion raised procedural, substantive and evidentiary objections, including infringement of the First Amendment, the constitutional right to privacy, the Attorney-client privilege and the psychotherapist-patient privilege.

The Archdiocese, on June 18, 2002, produced to the Court three sealed files containing the documents pertaining to the three named priests, except for documents for which the attorney-client privilege was raised. The Archdiocese provided privilege logs and sought in camera review by the Court to determine its duty to produce the documents, in light of any potential constitutional or evidentiary privileges.

Thereafter the People filed its opposition to the priests Motion to Quash. The Court denied the procedural objections [based on the issue of the SDT’s absence of an affidavit of probable cause] on July 15, 2002. Thereafter, on July 18, 2002, the referee was initially appointed to assist the court.

The Grand Jury on July 17 and 23 issued additional subpoenas for fourteen more priests. Over the next few weeks the Archdiocese submitted additional documents on two of the original named priests with objections and on four of the newly named priests with objections.

On July 29, Mr. Steier filed a writ petition concerning the first three subpoenas. The Court of Appeal issued a stay of production on documents. The Appeal Court filed an Order to Show Cause on Mr. Steier’s writ petition and set the matter for hearing on December 11, 2002. The stay remained in effect.

In early August 2002 additional documents were provided with objection and Attorney Steier filed Motions to Quash on behalf of four priests named in the subpoenas served in July 2002. This motion was before the referee.

On August 13, 2002 the parties agreed to stay any further proceedings in this Court pending a ruling from the Court of Appeal. The Court suspended any further review of the documents by the referee and directed the Archdiocese not to produce any additional documents pending completion of appellate review.

In the months of September, November and December, Criminal complaints were filed against five of the priests.

On or about December 12, 2002, the Court of Appeal denied Mr. Steier's writ petition. Michael B. v. Superior Court of Los Angeles County 103 Cal. App. 4<sup>th</sup> 1384, 127 Cal. Rptr 2d 454. On December 18, 2002 the District Attorney withdrew the Grand Jury Subpoenas and issued new post-filing subpoenas for the charged priests. The Court ordered all documents to be returned to the Archdiocese and ordered the Archdiocese produce only those documents that would be responsive to the subpoenas.

On February 28, 2003, the Archdiocese filed privilege logs, documents and its Motion to Quash. This motion was before the referee. On March 6, 2003, Attorney Steier filed a brief addressing the specific objections by his clients [name deleted], [name deleted], [name deleted] and [name deleted].

Attorney Daniel A. Guerrero, on behalf of his client [name deleted] (BA239265), joined in the Motion filed by the Archdiocese, the objections and claims of privilege.

This Court held hearings on the Motions to Quash and considered various declarations before arriving at its Proposed Decision. During the period that counsel had to object to the Proposed Decision its existence became known to the public. The press through the Court requested the Proposed Decision be released. This request was denied by the Special Master.

The Los Angeles Times and Los Angeles Daily Journal filed a Petition For Writ of Mandate in the Second Appellate District Case No. B169890. The Justices of Division Three directed the Superior Court to publicly file its order appointing the Special Master/Discovery Referee. This was done. The Appellate Court in an opinion filed December 12, 2003 concluded that ancillary proceedings such as the present matter, “and the documents filed in connection therewith relating to grand jury matters should be closed and sealed to the extent necessary prevent disclosure of matters occurring before the grand jury.”

The Court of Appeal remanded the matter to the referee to determine if there is some individualized aspect of the motion to quash litigation that can be disclosed without revealing the nature, scope and direction of grand jury proceedings.

The Court of Appeal did not direct any particular process for the referee to follow on remand other than to indicate that the referee should make “individualized disclosure determinations.”

At this point the Referee intended to continue closed hearings to determine what matters could be disclosed. [Order dated December 31, 2003].

In May 2004 I decided it was unnecessary to hold a hearing regarding the Remand from the Court of Appeals and filed a public order dated May 11, 2004.

In that order I found that the nature of the grand jury’s investigation, names of persons whose records had been subpoenaed, and the names of the agency from whom the records were sought had been officially disclosed in the appellate proceedings in this case.

I advised Counsel that following a closed hearing I would determine what pleadings might become subject to public disclosure, and that my decision in these ancillary proceedings will determine whether a number of claimed privileges preclude a grand jury from receiving and considering any of these records.

The records found not to be privileged and what the grand jury will do with those records will remain subject to secrecy. I advised it was my intent to publicly release my decision and to redact matters determined to be subject to grand jury secrecy from any pleadings or declarations referred to in the final decision so that those pleadings or declarations may also be released in redacted fashion. No counsel filed an objection to this order.

During hearings on June 25, 2004 and July 9, 2004 after discussion with counsel the Court at the request of the Archdiocese decided to issue one order that discusses the law and then apply it to the specific documents produced by the Archdiocese. Though the District Attorney preferred that the Court issue a ruling on the legal privileges and then another order as to the individual documents, the District Attorney did not object to the procedure.

On June 25, 2004 based upon the indications in the Courts Proposed Decision and having heard argument from the District Attorney, the Archdiocese and Attorney Steier, the Court quashed for the reasons stated all of the subpoenas that were the subject of the previous proceedings and continued the hearing to July 9, 2004. The District Attorney was to file new subpoenas.

On June 30, 2004, two new subpoenas duces tecum were issued, the [name deleted] SDT and the [name deleted] SDT, the New Grand Jury Reference Number being GJ04-05/03. Attorney Steier served and filed a Motion to Quash the two subpoenas. The Court returned to the Archdiocese all of the records produced by the Archdiocese except those documents pertaining to [name deleted] and [name deleted]. The District Attorney filed the transcript of the Grand Jury proceedings of July 6, 2004 covering the two new subpoenas duces tecum which transcript the Court has received and reviewed.

All counsel agreed that the Points and Authorities, declarations and oral arguments previously heard in reference to GJ01-02/04 and the criminal trials and the Proposed Decision may be considered

by the Court in deciding the new Motion to Quash Ref. No. GJ04-05/03 and the applicability of the claimed privileges to the Archdiocese documents.

After the original Grand Jury subpoenas were quashed and Trial subpoenas were withdrawn [Case Numbers VA073139, PA042836, BA236981 and BA239625] the new subpoenas GJ 01-02/04 were served (see *supra*) and these subpoenas are the subject of attorney Steier's Motion to Quash.

The arguments set forth by petitioners and respondent in the original two Motions to Quash and the present Motion to Quash are now addressed by the Court.

### **Motion To Quash**

Attorney Donald H. Steier of Guzin & Steier represents the individual priests. Mr. Steier appeared and argued the Motion on April 1, 2003, June 25, 2004, and July 9, 2004.

The Roman Catholic Archbishop of Los Angeles, a corporation sole, also known as the Archdiocese of Los Angeles was represented at the April 1, 2003, June 25, 2004 and July 9, 2004 hearings on the Motion to Quash by Hennigan, Bennett & Dorman LLP by J. Michael Hennigan, Esq. And Donald F. Woods Jr., Esq. The Archdiocese submitted declarations in support of the motion, of primary consideration were the declarations of Cardinal Roger M. Mahoney, and Monsignor Craig A. Cox, Vicar for Clergy.

The Los Angeles County District Attorney filed one opposition to both Motions. Included in the papers were supporting declarations in opposition to the Motion to Quash of A. W. Sipe and Fr. Thomas Doyle.

At the hearing on April 1, 2003, the District Attorney was represented by William Hodgmann, DDA, Irene Wakabayashi, DDA, Brentford Ferreira, DDA and Steve Katz, DDA.

Also joining in the Motions filed by the Archdiocese and appearing at the April 1, 2003 hearing was Daniel Guerrero, Esq. on behalf of his client [name deleted] (BA 239625).

Petitioner, the Roman Catholic Archbishop of Los Angeles (hereinafter "Archdiocese"), filed evidentiary objections to the declarations of A. W. Richard Sipe and Thomas Doyle which were submitted with the People's Opposition. This Order will first address the evidentiary objections to the initial Sipe and Doyle declarations, and thereafter, will address the merits of the Motions to Quash. Objections and Further Objections to the Doyle declarations have been ruled upon separately and are sealed.

***Objections to the Declaration of Sipe:***

A.W. Richard Sipe's declaration had attached a curriculum vitae.

After a review of the curriculum vitae, I find that Mr. Sipe's background, training, experience and research qualifies him as an expert regarding the mental health issues of the Roman Catholic priests. However, upon the same review, I find that Mr. Sipe does *not* qualify as an expert on the practices of the Archbishop of Los Angeles, as regarding the Archbishop's responses to reports received of priests allegedly molesting children. Accordingly, the objection of the Archdiocese to those identified portions of paragraphs 10, 11 and 16 of the Sipe declaration are *sustained*. (Ca. Evid. Code §801 subdiv. (b)); *Mahoney v. Superior Court* 142 Cal. App.3d 937 [declarant giving of an opinion on a question of law]; (Evid. Code §720 subdiv. (a))

***Objections to the Declaration of Thomas Patrick Doyle:***

Thomas Patrick Doyle, a Roman Catholic Priest ordained in 1970, also submitted a declaration in opposition to the Motion to Quash. Attached to his declaration was a curriculum vitae which I find qualifies Fr. Doyle as an expert in Canon Law and sexual abuse of children by Catholic clergy. Accordingly, the objection by the Archdiocese to paragraphs 3, 4, and 5 of Fr. Doyle's declaration are overruled. These objections are mere argument about the training and experience of the witness and do not address the substantive aspects of the declaration.

In addition, the objection to paragraph 6 is overruled. Fr. Doyle's declaration refers to "Formation Privilege" which is not mentioned in the Cardinal or Vicar's declaration. The referee notes the activity sought to be protected is the free exercise of religion. In addressing this activity, there is reference to the "formation" of the priest.

Objections by the Archdiocese to paragraph 7 and 8 of Father Doyle's declaration and critique filed in opposition to the Motion to Quash concerning Sister Murphy's and Monsignor Cox's declaration are overbroad and argumentative. Accordingly, the objections are overruled.

The objection by the Archdiocese to paragraph 15 of the Doyle declaration "is not covered by privilege" the objection is sustained. (Evid. Code 720, subdiv. (a) and 1032).

The Archdiocese objection to paragraph 16 of the Doyle declaration is denied. The objection is argumentative.

As to the Archdiocese objection to the sentence in paragraph 17 of the Doyle declaration which states: "I have rarely if ever seen a case wherein canonical requirements for a preliminary investigation were carried out either correctly or at all..." is denied. The statement is relevant and does not refer to the practice of the Los Angeles Archdiocese.

As to other portions of paragraph 17 of the Doyle declaration, the Archdiocese objects to his statement "... I have been involved in many cases where information contained in the secret archives... was... subpoenaed and surrendered..." Again, no evidentiary objection is cited. Instead, the Archdiocese submits argument. The Archdiocese objection based on lack of foundation is overruled.

The Archdiocese's objection to paragraph 18 of the Doyle declaration does not state grounds for an objection. The objection is overruled on the issue of relevance.

The Archdiocese's objection raised as to the portions of paragraph 19 of the Doyle declaration stating "the priests employer" is sustained. As to the remaining part of the Paragraph 19, the objection is overruled since it is argument.

The Archdiocese's objections to paragraph 20 of the Doyle declaration which states: "Both Cardinal and Father Cox state that all communications between a bishop and priest are bound by an equal level of confidentiality" and "absolute confidentiality (in conversations between a bishop and his

priests) is a myth.” The objection is argumentative. No legal objection is set forth. Accordingly, the objection is overruled.

The Archdiocese also objects to the following language in paragraph 20 of the Doyle declaration, which states: “who then communicates it to the Cardinal and to the General Counsel.” This objection is sustained.

The Archdiocese’s objection to the sentence in paragraph 20 of the Doyle declaration, which states: “the entire scenario can hardly be described as an exercise in the priests’ formation process” is overruled.

The Archdiocese’s objection to the language in paragraph 20 of the Doyle declaration which states: “it is an investigation of a crime” is overruled.

The Archdiocese’s objection to the sentence of the Doyle declaration which states: “it (the so-called investigation) involves the public...” in paragraph 20 is sustained.

The last Archdiocese objection in paragraph 20 of the Doyle declaration which states: “any hope that this information is privileged is lost... (because) so many people are privy to what the priest shared” is sustained.

### **The Subpoenas Violate the Federal Constitution**

The Archbishop objects to production of the following:

- (1) Any writings reflecting the responses of specific priests to him about allegations of child molestation or sexual abuse;

- (2) The reports and comments of any physician, psychotherapist, or spiritual advisor consulted by the Archbishop or a specific priest;
- (3) The discussions between the Archbishop, his Vicar for Clergy, spiritual and medical advisors, and the individual priests in regards to:
  - (a) Evaluating and/or treating the needs and obstacles to the spiritual formation and development of the priests; and
  - (b) Such discussions in regards to the Archbishop's pastoral care and assignment of priests based on his view of their needs.

The Archbishop states that he does not dispute the right of the State to prosecute criminal conduct by priests. However, the Archbishop requests that the judicial process be conducted without State intrusion into the ongoing formation spiritual guidance and psychological evaluations and treatment inherent in the pastoral relationship between himself and his priests.

The First Amendment of the United States Constitution provides, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." (U.S. Const., Amend. I.) The First Amendment applies to the States through the Fourteenth Amendment (*Zelman v. Simmons-Harris*, (2002) 122 S.Ct.2460).

In its Motion to Quash, the Archdiocese sets forth in detail, through declarations and exhibits, the role of Bishops and priests. Roman Catholic Church dogma teaches as one of its fundamental beliefs that Bishops are direct successors of the apostles of Jesus Christ. They are responsible within their dioceses as pastors, teachers, ministers of the sacraments and administrators of the governance of the Church. In particular, a Bishop is to have a special concern for his priests.

The Bishop investigates and evaluates evidence of priestly misconduct, and his investigation is kept in confidential files. The Bishop alleges that this requirement of confidentiality is essential and

facilitates the type of open communication necessary for effective governance of the Church regarding these particularly sensitive issues.

Under the Church's Canon, the Bishop is permitted to appoint Episcopal vicars. An Episcopal vicar has the same powers as a Bishop in the specific type of activity for which he is appointed.

All priests are enrolled or incardinated within a diocese and responsible to the bishop or superior of a particular religious order. In the Archdiocese of Los Angeles, the Bishop has appointed an Episcopal Vicar denominated Vicar for Clergy, to act in his behalf with all priests incardinated in the Archdiocese. The Archdiocese states that the Vicar for Clergy has the obligation to oversee the continuing formation and growth of the diocese priests in relation to their emotional, physical, psychological and spiritual lives.

Under Canon law, the Bishop has the burden of sanctifying his priests, and the relationship is described as like a father and son by reason of the sharing in the priesthood and mission of the bishop. The Archbishop alleges a fundamental imperative in this pastoral relationship of father to son which obligates the bishop to care for and treat any emotional, physical, or spiritual problem a priest may be experiencing.

Priests of the Church are required to observe continence. Canons provide that the bishop may establish detailed boundaries for his priests concerning chastity and is to pass judgment in particular cases concerning the observance of this obligation. The bishop is obliged to intervene and judge inappropriate conduct of any priest and to impose restrictions and penalties as appropriate in his moral judgment.

The Archbishop in this Motion to Quash argues that the bishop has the right and duty to discuss with his priests matters of sexuality. To accomplish this, the Archdiocese alleges that there must be open communications between the bishop and his priests.

The Archbishop of Los Angeles has promulgated policies for clergy affecting the presence of and interaction with minors. He has also developed policies regarding accusations of sexual misconduct by priests.

In support of the Motion to Quash, the Vicar for Clergy stated that a report to the Vicar for Clergy of any boundary violations or accusations of sexual abuse is taken very seriously and investigated immediately. The involved priest is confronted and is encouraged to discuss whatever problems he is experiencing regarding chastity. The Vicar states that based on "...the religious relationship between the bishop and his priests, the priest is encouraged to communicate his deepest psychological and sexual issues, to undergo psychiatric evaluation and treatment, and to share the results of his therapy with the Vicar and the Bishop." The Vicar states that all of this procedure is undertaken for the purpose of the ongoing formation and sanctification of the priest.

When the pastoral responsibility requires a canonical investigation of a boundary violation or accusation of sexual misconduct, the process is conducted in accord with the requirements of Canons 1717-1719 and pursuant to Archdiocesan practice. These Canons require the bishop to inquire carefully either personally or through some acceptable person, about the facts and circumstances and about the imputability of the offense.

The Archdiocese goes on to state that to date, the bishops and priests have always understood that these records would be confidential, and files covering these materials would be kept separately from the priest's normal personnel file. Such files are designated as the "Confidential" or "C Files" and only the Vicar for Clergy and his secretary have keys for the cabinet where the files are kept.

The Archbishop must rely on self-disclosure, the information provided by victims, as well as other priests and witnesses, and the recommendations of priests, psychotherapist and spiritual director in order to decide the appropriate action to be taken against a priest. Such actions may include allowing the

priest to continue in public ministry, placing restrictions upon the priest, enrolling priests in therapy programs or other alternatives, such as retirement, long-term residential confinement for treatment or laicization.

Petitioner alleges the ongoing formation and sanctification of the individual priests, including the ability to confidentially evaluate sexual misconduct and provide appropriate counseling and therapy, is fundamental to the Mission of the Church because priests are the primary leaders of the Church. Public disclosure of the interventions, subsequent psychological evaluations and treatment of the priest will destroy the confidentiality and trust between the bishop and his priests which is essential to the ongoing formation process.

The People, in opposition to the motion, submitted the declaration of a Roman Catholic priest, Thomas Doyle, who is an expert in Canon Law. This declarant stated that investigations of child abuse documented by the Archdiocese, through the Vicar for the Clergy, which are kept in the “secret archives” (confidential files) can be and have been supplied to law enforcement in other jurisdictions.

The People allege that they seek only evidence of criminal conduct by priests against children, and do not seek evidence to litigate an intra-church dispute. (*Citing, Employment Div. V. Smith*, (1990) 494 U.S. 872; *People v. Trippell*, (1997) 56 Cal.App.4<sup>th</sup> 1532) The People argue that the First Amendment does not provide “exemptions from a generally applicable criminal law.”

However, The Archdiocese states that the grand jury subpoenas which seek documents pertaining to counseling and spiritual relations between a bishop and his priests, must be scrutinized under the Establishment and Free Exercise Clauses of the First Amendment.

The Archdiocese argues that the statutes permitting the grand jury to issue subpoenas are admittedly secular in purpose. Their effect however, under the circumstances of this case is to “inhibit religion” and “foster an excessive government entanglement with religion.” First, the subpoenas interfere with the ecclesiastic policy by mandating the disclosure of information that, under Roman Catholic practice, is held in strict confidence. Second, that subpoenas require the disclosures of files of a

unique Roman Catholic practice of confidential pastoral ministry that would discourage priests from engaging in that practice.

The Archdiocese contends that subpoenaing the interviews by a bishop of his priests about their conduct, obtaining detailed sexual and psychological histories of priests presented to their bishop or reviewing a bishop's decision on behalf of the Church as to a priest's future assignment or ministry, is an entanglement by the State which is excessive and constitutionally impermissible.

Citing *Bollard v. California Province of the Society of Jesus*, (1999) 1996 F.3d 940, the Archdiocese argues substantive entanglement occurs when the State intrudes into the Church's freedom to select its ministers, to mandate spiritual or psychological treatment, or to reassign, terminate and restrict priests. The Archbishop contends that the intrusion of the subpoenas inevitably will hinder the ongoing formation and spiritual development of priests which is a matter of critical substance to the Church.

Procedural entanglement results when protracted legal process puts the Church and State as adversaries. Here the Archbishop argues that the grand jury investigation is just commencing with these subpoenas and, he claims, will no doubt progress into testimony of religious leaders and investigation into the reasons for the decisions made relating to the treatment, reassignment, and renewed ministry, with or without restrictions of the involved priests.

The crux of the Bishop's argument is that he seeks an order preventing the chilling effect of disclosure on the internal process of priestly formation, discipline, selection and assignment, which is inherent and fundamental in the free exercise and practice of any religious organization.

The Archdiocese argues that the People can prove their case without intruding into the highly confidential, personal or First Amendment rights of the Archbishop and his priests.

The Archdiocese argues that the fundamental beliefs and doctrines of the Roman Catholic religion include (1) intervention interview conducted by the Archdiocese or Vicar for Clergy with an accused priest; (2) subsequent discussions with therapists and discussions with the Archbishop about treatment; (3) subsequent use of programs and restrictions in ministry and/or residence to avoid the occasion of the sin alleged. The intense discussions involved in intervention counseling and treatment

are all done as part of the ongoing formation, development and sanctification of the priesthood. The disclosure of these discussions would directly intrude into religious beliefs, doctrines and practices of the Church.

I find that the issuance of the grand jury subpoenas is a secular act under the triparte test of *Lemon v. Kurtzman* (1971) 403 U.S. 602. I also find that the effect of the statute and the judicial act in approving the issuance of the subpoenas in this instance does *not* inhibit the practice of the Roman Catholic religion as argued by the Archdiocese. Nor does it permit excessive government entanglement with religion.

The declarations of Fr. Thomas Doyle, who the Archdiocese concedes is an expert on Canon Law, states there is no Canon Law that prevents the Archdiocese from complying with the subpoenas or any Canon Law which protects the documents from disclosure in compliance with the subpoenas.

The subpoenas, in effect, compel the disclosure of communications<sup>1</sup> deemed confidential under the laws of the Roman Catholic Church. These communications are utilized by the Archbishop of Los Angeles in his ongoing formation of his priests as well as for his interactions with priests, and his determination of the necessity of counseling and treatment. The same communication may be utilized to initiate or be part of the investigation conducted by the Archdiocese into the merits of a complaint or self disclosure. Such a disclosure in no manner intrudes into the religious beliefs and doctrines of the Church and therefore does not violate the free exercise of religion under the First Amendment.

All parties agree that these communications do not enjoy the highest degree of secrecy, namely the seal of confession. The People agree that, in the Los Angeles Archdiocese, those communications are kept confidential.

The fact both priests and Bishop expect this confidentiality to be maintained does not make this understanding a religious belief or doctrine. Instead, it is the practice of the Bishop of the Los Angeles diocese to utilize the investigation as part of the ongoing sanctification of his priests. The Bishop cannot use an investigation of a criminal act to urge repentance, psychological evaluation or treatment and then refuse to disclose on the grounds the State is now becoming entangled in religious matters and interferes

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<sup>1</sup> Albeit if not protected by other privileges.

with the free exercise of religion. Certainly the Bishop or the Vicar for Clergy can address private emotions, sexual and psychological needs with great sensitivity and support the priest receiving the psychotherapy and spiritual guidance he needs to reform even if those communications may be made known to third parties in furthering the state's compelling interest to prosecute child molesters.

Monsignor Cox, Vicar for the Clergy, supplied the Court a lengthy declaration citing the role of the Bishop and the manner in which the Bishop responds to reports of inappropriate behavior. "...The report of any boundary violation or accusation of sexual abuse is taken very seriously and investigated carefully. The involved priest is confronted and is encouraged to discuss whatever problems he is experiencing regarding chastity..." Msg. Cox states "Based on the fundamental religious relationship between the bishop and his priest, the priest is encouraged to communicate his deepest psychological and sexual issue, to undergo psychiatric evaluation and treatment, and to share the results of this therapy with the Vicar and the Bishop. All of this for the purpose of the ongoing formation and sanctification of the priest." The Declaration states also the process is conducted in accord with the requirement of Canons 1717-1719 and the norms of the Archdiocese practice.

The Vicar for Clergy included with his declaration Exhibit 3 "New Commentary on the Code of Canon Law." A review of those Canons, and in particular the Commentary, is enlightening on the issues before the Court.

Canon 1717 – Section 1 states in Part:

"Whenever an ordinary has knowledge, which at least seems true of a delict, he is carefully to inquire personally about the fact..."

The Commentary explains as follows:

"The penal process is not to be undertaken lightly given its potentially detrimental legal-pastoral consequences for the accused i.e. the curtailment of the exercise of one's right... such an investigation is related

to their preeminent responsibility for fostering the well-being of the diocese... and ensuring compliance with church discipline.”

The Commentary continues:

“Despite the importance of protecting the wellbeing of the community, the code is particularly concerned about safeguarding the reputation of the person accused of an ecclesiastical delict.

“...The preliminary investigation (Sections 1717-1719) is geared to ascertaining whether there are solid grounds for judging that the ecclesiastical delict has been committed... the preliminary inquiry should examine the relevant facts of the case, factors affecting the imputability of the accused and possible canonical and civil damages...”

Canon 1718 states in part:

“When it seems that sufficient evidence has been collected, the ordinary is to decide

1. Whether a process to inflict or declare a
2. penalty can be initiated; ...”

Section 4 states in part:

“Before he makes a decision according to the Norm of Section 1 and in order to avoid useless trials the ordinary is to examine carefully whether it is expedient for him... ...with the consent of the parties, to resolve equitably the question of damages.”

The Commentary to Canon 1718 continues:

“In other instances, however, although a process may be warranted and there is evidence of an ecclesiastical delict such a process may not be expedient... The Church’s well-being and that of the offender might be better served by legal pastoral measures other than a penal process, for penalties are to be imposed only as a last resort when all other legal-pastoral measures (e.g. fraternal correction, rebuke, therapy) have failed to repair scandal, restore justice and reform the offender.”

Canon 1719 states in part:

“[T]he acts of the investigation, the decrees of the ordinary... and everything which preceded the investigation are to be kept in the secret archive of the curia if they are not necessary for the penal process...”

Again the Commentary to Canon 1719 attached as an exhibit to the declaration of the Vicar for the Clergy states “Although no process may be conducted, the maintenance of such acts in the archives (secret) ensures their availability if a new accusation subsequently prompts a penal process or if it is necessary to prove to the civil court that the church handled an accusation responsibly.” (Emphasis added)

It is clear to me that the primary purpose of Canons 1717-1719 is to set forth rules to be followed in conducting an investigation of a priest and the subsequent determination of the action to be taken, with consideration of possible penalties. The process is protective of the rights of the accused priest. None of the Canons 1717, 1718 or 1719 discuss the process relating to the formation of the priests. None of the Canons 1717, 1718 or 1719 mention that priests should be encouraged to communicate their deepest psychological and sexual issues, to undergo psychiatric evaluation and treatment. These Canons do not mandate the sharing of results of the priest’s therapy with the Vicar and Bishop. Pastoral is not mentioned in any of these canons and is only mentioned twice in accompanying commentaries. In each of the instances where it is mentioned in the Commentary, pastoral is referring to possible pastoral

consequences to the accused, i.e. the curtailment of a right. Again, the continuing “formation” and growth of the priests in their emotional, physical, psychological and spiritual lives is not mentioned.

While the Bishop or Vicar have the responsibility to continue the formation of their priests, that is not the investigations the Vicar has described. If the Archbishop in the Los Angeles diocese has utilized these investigations as some part of his pastoral responsibility in the formation of his priests, it is a practice and norm of the Los Angeles Archdiocese and does not call into question religious faith or doctrine.

As the Commentary to Canon 1719 states:

“The maintenance of such acts in the archives ensures their availability if a new accusation subsequently prompts a penal process or if it is necessary to prove to the civil court that the Church handled an accusation responsibly.”

I find that the Church contemplated the possible release of these investigations even if placed in the diocese secret archive. Accordingly, the disclosure of the intervention, interviews and investigation in response to the subpoenas does not violate the establishment clause of the First Amendment.

Citing *Bollard v. California Province of the Society of Jesus*, (1999) 196 F3d 940 in support, the Archdiocese argues that the issuance of the subpoenas and the People’s receipt of the documentation of the investigations will violate the Establishment Clause of the First Amendment. The Archdiocese argues that the Establishment Clause will be violated as a result of a protracted legal process, pitting the Church and the State as adversaries.

As in *Bollard, supra*, where the Jesuits deplored sexual harassment, the Archdiocese condemns the molestation acts. The Vicar states... “child molestation by a priest or any other person is grievously sinful. It is also an ecclesiastical crime (Canon 1395)...” There is, therefore, no danger that by disclosing the contents of these files the Court will be passing judgment or impact on questions of religious faith or doctrine.

I find that the issuance of the grand jury subpoenas does not have as a principal or primary effect the inhibition of religion. At most, it may change the manner in which the Archdiocese may fulfill its role in the consulting and formation of priests by not utilizing the process set forth in Canons 1717-1719.

The Archbishop may not keep confidential the potential evidence or proof of a crime by asserting that such disclosure would interfere with the communications between priests and bishops. The argument by the Archdiocese that such disclosure would somehow raise ecclesiastic policy to religious doctrine or faith is without merit.

Between hearings on the original Motions to Quash and the present (GJ04-05-03) Fr. Doyle, who the Archdiocese admitted was a Canonical Expert, submitted an additional or supplemental declaration. Criticism was presented about his education and achievements and finished by alleging he is an advocate for change in the Church's structure and has become an ally of civil plaintiffs. Such argument and objections go to the weight to be given to his testimony.

The Court makes no decision whether Msgr. Cox or Fr. Doyle has correctly set forth canons or their interpretations. The Archdiocese argues that the Court, if it interprets Canon Law [cited by the Archdiocese in support of some of its arguments] is impermissibly involved or entangled in Church affairs. It argues the only official interpretation of a Canon is by a Pope (and supplies no official interpretation of the Canons in question). The Archdiocese then argues that since the Archbishop is the highest ecclesiastical authority in this matter this Court must accept the Archbishop's interpretation, though such an interpretation would shield many documents in the Archbishop's possession.

A review of some of the evidence is important.

The Archdiocese in its Report to the People of God: Clergy Sexual Abuse Archdiocese of Los Angeles 1930-2003 at page ii [in evidence]:

“Prior to 1997 laws did not require all clergy to make such reports. The Archdiocese reported cases regularly but informally....”

The document prepared and distributed by the Archdiocese admits reports were made to public officials. The Archdiocese departed from the purely pastoral realm. The Archdiocese did not consider the process merely pastoral if reports were made to civil authorities.

In the same Report to People of God (*supra*) it is stated "...From 1986 forward it became the practice for the Vicar for Clergy to promptly interview a victim as soon as a report of misconduct was made and confront the accused priest (page 4). As the Respondent points out, these concepts of confrontation and accusation are not consistent with the declarations submitted, that these interviews were for the purpose of the ongoing formation and sanctification of the priest.

Counsel for the Archdiocese stated, apparently as a result of the Court's finding in the Original Proposed Decision, [Reporter's transcript of Grand Jury Proceedings July 9, 2004 page 80 line 5] "The Archdiocese virtually has never used canonical investigation of any ecclesiastical crime. Sexual abuse would be an ecclesiastical crime just like a criminal crime. But we have never actually done one..."

The Archdiocese in the original declaration of Msgr. Cox stated the proceedings were done pursuant to Canon 1717-1719. The Archdiocese now states it has virtually never used a canonical investigation.

Counsel for the Archdiocese also stated [Reporter's Transcript *supra* page 11 line 24] "All the Canons, even 1717 and 1719 are pastoral because all of Canon Law is for a broader purpose of living a life in conformity... of a life of Christ." Taken to its logical conclusion a canonical investigation and proceeding would then be pastoral and subject to First Amendment protection. Yet we know one of the Canons specifically refers to preserving the record to show civil authorities.

When asked Counsel for the Archdiocese advised that these files were not investigations, did not contain statements or reports from victims. I find that not to be totally accurate from a review of the files.

Of concern is a further statement that possible other interviews of witnesses, and counseling sessions of victims were conducted within a parish setting. No records to my knowledge have been produced from individual parishes.

The Court finds a label makes no difference. I find these investigations and memos were done clearly as a result of allegations of sexual abuse, a crime, also a serious sin and the potential for causing great harm to the Church.

After reviewing the documents the Court is of the opinion that the actions the Archdiocese was taking through these efforts memorialized in the Confidential Files was what a normal employer would follow if a valued, trusted employee was the subject of a child abuse charges. Because of the nature of the Archdiocese, the Archdiocese has couched these efforts as pastoral and an integral part of the cleric's formation and special relationship to the Bishop.

I find they are investigations to ascertain the validity of the charges and to assist the Archdiocese in formulating decisions on a course of action for the protection of the Church and at the same moment to assist the cleric.

The Archdiocese fails in its burden of proof of showing that the disclosure of documents kept in the secret archives or what it describes as the pastoral relationship of Archbishop and cleric would be an improper interference or entanglement with religion.

The Motion to Quash Based on First Amendment grounds, the Establishment Clause and the Free Expression Clause is denied.

Counsel for the Archdiocese has agreed that the referee may review the subpoenaed sealed documents. The referee has reviewed in camera the documents to determine if they might be redacted and disclosed or returned to the Archdiocese.

**INTERNAL CHURCH DOCUMENTS PERTAINING TO SEXUAL IMPROPRIETIES OF  
PRIESTS AS WELL AS THEIR PSYCHOLOGICAL EVALUATION AND TREATMENT ARE  
PROTECTED FROM PRODUCTION UNDER EVIDENCE CODE §1030 – 1035.**

Section 1032 of the California Evidence Code provides:

“As used in this article, ‘penitential communication’ means a communication made in confidence, in the presence of no third person so far as the penitent is aware, to a clergyman who in the course of the discipline or practice of his church, denomination, or organization, is authorized or accustomed to hear such communications and under the

discipline or tenets of his church denomination or organization has a duty to keep said communications secret.”

The Archdiocese alleges this statute and others in this article (i.e. Sections 1030 through 1035) were re-formulated in broader terms in 1965. The Archdiocese states that although the statute continued to use the traditional terminology “penitential communication,” the statutory definition makes it clear that a much broader range of communications are protected beyond those that are specifically “penitential” in nature.

The Archdiocese further states that it should be called a “Cleric-Congregant” privilege (*People v. Carmona*, (1993) 82 N.Y.2d 603) and that religious counseling regarding a priest’s alleged sexual assaults (i.e. communications between a Vicar for Clergy and a priest) was indisputably a situation where the Vicar was acting in his professional character, or as a spiritual advisor. The Archdiocese contends that the communications made by the priest fall within the protections afforded by the privilege.

In analyzing the Archdiocese’s claim under the First Amendment, I have determined that when the Archdiocese conducted “religious counseling” pursuant to Canons 1717-1719, such proceedings were neither pastoral nor penitent in nature. These proceedings were conducted in order to ascertain whether the alleged molestations did in fact occur. In addition, the proceedings also provided the possibility of conducting penal proceedings in order to ascertain the appropriate disposition, care, treatment or punishment of the priests.

I also find that although these proceedings are treated with confidentiality, the proceedings are nevertheless preserved in appropriate archives. One of the reasons for such an action is to prove to civil authorities the Archbishop acted appropriately. Canon Law permits possible disclosure of proceedings. It is assumed the Vicar or his representative so advises the priest or witness with whom he communicates when conducting these investigations.

As mentioned above, I find that although the investigations/counseling proceedings between the Bishop and his priests are held in confidence, documentation of such proceedings is subject to disclosure pursuant to a subpoena. In addition, I find that the investigation and the interviews of priests are *not*

privileged under Evidence Code §§ 1030-1034 when initiated by the Vicar. For a priest to seek absolution, or the Vicar to grant absolution, it is understood the sacrament of confession would be involved. There is no claim by the Archdiocese that these counseling sessions are covered by the seal of confession.

During the investigation, the Vicar may confront the priest with the accusation at issue or the priest might report the incident. The priest may deny the accusation or, if it is admitted, the priest may agree to disclosure to the General Counsel of the Archdiocese, a psychotherapist or ask the Archdiocese for help.

Similar to the discussion in this Order regarding the First Amendment, when a Bishop or Vicar has in fact intermingled pastoral counseling with the investigation of a crime, the privileges bestowed under Evidence Code §§1034 and 1035 do not apply.

I order the documents to be reviewed in camera. Such review does not excessively entangle the Court with religion as the Archdiocese has caused the issue to arise by intermingling counseling and penitential sessions with investigations under Canons 1717-1719.

However, communications that are indeed involved with pastoral counseling or penitential in nature are privileged under Evidence Code §§1034 and 1035. It is not required that such communications be under the seal of confession in this state.

**COMMUNICATION WITH PSYCHOTHERAPIST AND RECORDS OF SUCH  
COMMUNICATION ARE PRIVILEGED (EVIDENCE CODE §1010 Et Seq.)**

Evidence Code §1012 states:

“As used in this article confidential communication between patient and psychotherapist means information obtained by an examination of the patient transmitted between a patient and his psychotherapist in the course of the relationship and in confidence by a means which, so far as the patient is aware, Discloses the information to no third person other than those who

are present to further the interest of the patient in the consultation, or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which psychotherapist is consulted and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship.”

In *Smith v. Superior Court*, (1981) 118 Cal. App.3d 136, the court stated:

“Accordingly, this article (Evid. Code §1012) establishes a new privilege that grants to patients of psychiatrists a privilege much broader in scope than the ordinary physician-patient privilege...”

The People bear the burden of proof to establish that the communication was not confidential pursuant to Evidence Code §917.

Evidence Code §912(d) provides:

“A disclosure in confidence of a communication that is protected by a privilege provided by Section 954... when disclosure is reasonably necessary for the accomplishment of the purpose for which.... The psychotherapist was consulted is not a waiver of the privilege.”

Citing Evidence Code §916 and *Lemelle v. Superior Court*, (1978) 77 Cal.App.3d 148, the Petitioner argues that the Court must exclude privileged information sua sponte. This is because the Archdiocese is not authorized to claim the privilege (on behalf of the priests) and there is no party before the Court who is authorized to claim the privilege.

The People do not disagree. Instead they argue that the priests are required to sign a waiver of information form which allows information to be sent to the bishop, to be used for administrative purposes and/or shared amongst staff members. As such, it is not the purpose for which the psychotherapist was consulted and the privilege is waived.

I find in such instance, where a priest is not represented by counsel, the Court shall entertain such objections sua sponte. The documents will be reviewed in camera and a determination will be made as to whether this privilege applies.

### **THE SUBPOENAS REQUEST DOCUMENTS PROTECTED BY THE CONSTITUTIONAL RIGHT OF PRIVACY**

The California Constitution guarantees all persons the inalienable right to privacy. (Cal. Const., Art 1 Section 1) The right to privacy applies even if other privileges have been waived or do not apply. *San Diego Trolley v. Superior Court* (2001) 87 Cal.App.4<sup>th</sup> 1083. Disclosure may be permitted if justified by a compelling state interest.

The Petitioners argue that the People have made no showing whatsoever of any need for the information to prosecute the target priests nor have the subpoenas been drawn with narrow specificity.

The People in opposition to the Motion to Quash contend that the subpoenas are directed at the detection and prevention of child abuse, which is a compelling state interest. As such the disclosure of the information is justified.

I find that the subpoenas are directed at the detection and prevention of child abuse, which is a compelling state interest.

### **THIRD PARTY PRIVACY**

Petitioners contend that any disclosure of information contained in the records sought by the subpoenas violates the rights of the defendants, petitioners, and individuals who are not parties to this proceeding. In *Scull v. Superior Court* (1988) 206 Cal.App.3d 782, the information sought from patients was protected pursuant to Evidence Code §1014. No privilege is held by any third party in these proceedings.

Regarding defendants and Third Parties' right to privacy, the Court will balance the compelling interest of the state to investigate and punish child abuse against the interests of the state to investigate and punish child abuse against the interests of the individuals in having the documents remain confidential.

### **PRIVILEGED ATTORNEY-CLIENT COMMUNICATIONS**

Attorney-client communications are privileged pursuant to Evidence Code §950 et. seq.

Petitioners state certain less routine communications involving the General Counsel of the Archdiocese have been presented to the court for in camera consideration. Such in camera review has not been commenced pursuant to counsel's request for these rulings on the motion determining the present issues. I will review in camera the sealed documents to determine the applicability of this evidentiary privilege.

### **THE SUBPOENAS REQUEST INADMISSABLE EVIDENCE AND SHOULD BE QUASHED**

California Penal Code Section 939.6 provides:

“...(b) Except as provided in subdivision (c) the Grand Jury shall not receive any evidence except that which would be admissible over the objections at trial of a criminal action...”

The Grand Jury shall receive none but legal evidence and the best evidence in degree, to the exclusion of hearsay or secondary evidence. *People v. Crosby* (1962) 58 Ca.2d 713.

Petitioners in support of the Motion to Quash allege that most of the documents were prepared by third persons, many of whom are not amenable to service because they reside out of state or are deceased. Further, Petitioners alleged that every document subpoenaed is hearsay and should not be

delivered to the People or presented to the Grand Jury without testimony establishing a factual foundation.

The Court finds Penal Code Section 939.6 does not prohibit the production of the documents pursuant to the subpoenas. The Court finds that the petitioners have an appropriate remedy by challenge of any indictment through a Motion under Penal Code 995.

### **WORK PRODUCT PRIVILEGE**

No declaration having been filed in support of this privilege, I reserve all rulings until an in camera hearing is conducted. I will review the applicability of the privilege as it pertains to specific documents.

### **CONFIDENTIALITY OF MEDICAL INFORMATION ACT**

Petitioners allege that the California Confidentiality of Medical Information Act (California Civil Code §56 et seq.) provides that where an employee makes a disclosure of privileged medical information to his employer, subject to a policy or agreement of confidentiality, the information will remain confidential.

Counsel for the individual priests argue that this statute applies to the priests identified in the subpoenas. On the other hand, the Archdiocese carefully distinguishes the role of the priest and argues that a priest is not an employee. Should objections of the individual priests continue to be an issue, I will require additional declaration/evidence on the nature of the relationship with the Archdiocese before ruling.

### **SETTLEMENT PRIVILEGES**

Petitioners, individual priests, raise a privilege under the Evidence Code section which states: “all statements made and actions taken in the course of negotiating, settling or compromising claims are protected.” However, in citing to Evidence Code §1552, it is assumed that petitioners mean to rely upon Evidence Code §1152.

The trial court in *People v. Muniz* (1989) 213 Cal.App.3d 1508 allowed the people to admit testimony during the trial that the defendant had offered to pay for some of the victim’s medical expenses. The appellate court rejected defendant’s argument that the evidence was inadmissible pursuant to Evidence Code §1152. The section has no application to criminal cases. Accordingly, the Motion to Quash based upon Evidence Code §1162 is denied.

### **MEDIATION PRIVILEGE**

Petitioners, individual priests, cite to *Garstanz v. Superior Court of Los Angeles County* (1995) 39 Ca.App.4<sup>th</sup> 526 for the proposition that the subpoenaed records are privileged because they were made in the course of mediation. The record is devoid of any evidence by declaration that the subpoenaed records are related in any way to a mediation or a civil action.

I find Evidence Code §11152(a) and its successor Evidence Code §1119 do not apply to criminal proceedings.

The Motion to Quash based upon the allegation the records were related to a mediation, is denied for lack of proof.

### **FEDERAL CONFIDENTIALITY LAW**

Petitioners, individual priests, have sought leave to submit the declaration of the Medical Director of St. Luke Institute in support of their position. Permission to submit this declaration is granted, provided this remains an issue as to the individual priests.

Attached to this decision in Appendix A which contains the Courts ruling on the individual documents after in camera review.

The Court finds this description, identification of documents and ruling on their production to be covered by the Confidentiality rules governing Grand Jury Proceedings and orders the Appendix not to be released to the public.

There is in addition to these general rulings that is to be filed and given public access declarations that have been filed by the parties. A portion of those declarations that I believe do not violate the Grand Jury Confidentiality as set forth in the Appellate Court ruling will be made public.

On August 20, 2004 Attorney Steier on behalf of the individual priests filed a privilege log. The District Attorney argues that since the documents were subpoenaed from the Archdiocese Mr. Steier and his clients have no standing to raise any claim of privilege.

I have reviewed Mr. Steier's claims of privilege and find they closely track the objections raised during oral argument regarding the initial subpoenas and the new subpoenas in question.

I find that the claims of privilege based on Attorney Steier's privilege log would doubtfully add anything to these proceedings other than to delay further my rulings. I believe my rulings based upon the general objections raised by both the Archdiocese and Mr. Steier are clear. My rulings on the privileges raised by Mr. Steier on individual documents would add nothing to these proceedings and I therefore make no such rulings. I do not rule on the question whether his clients have standing to a separate privilege log.

The Court further orders a stay of thirty days on the production of any document ordered in Appendix A to allow all parties to consider the Court's decision, rulings on the documents and an opportunity to seek appellate relief.

So Ordered.

Dated \_\_\_\_\_

\_\_\_\_\_  
Hon. Thomas F. Nuss (Ret)  
Special Master